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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

CHARLES MANUEL, PETITIONER

v.

VETERANS ADMINISTRATION HOSPITAL; THOMAS W. SIMPSON; JAMES G. FASONE; JEROME HOBAN; PAUL VANCE; WILLIAM BEUTELL; and JAMES STEPHENS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EASTERN DISTRICT OF MICHIGAN

James R. Stearns
Attorney for Petitioner
3800 Penobscot Building
Detroit, MI 48226
(313) 962-7722

Francis L. Zebot
Assistant United States Attorney
231 W. Lafayette, 8th Floor
Detroit, MI 48226
(313) 237-4779

QUESTION PRESENTED

1. DOES THE PRIVACY ACT REQUIRE DISCLOSURE OF DOCUMENTS WHICH PURSUANT TO FEDERAL REGULATIONS ARE SUPPOSED TO BE INSERTED INTO A SYSTEM OF RECORDS WHERE A GOVERNMENT OFFICIAL FAILS OR REFUSES OR NEGLECTS TO OR PURPOSEFULLY PREVENTS DOCUMENTS FROM GETTING INTO THE SYSTEM OF RECORDS FOR HIS OWN PURPOSES?

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VETERANS ADMINISTRATION HOSPITAL; THOMAS W. SIMPSON; JAMES G. FASONE; JEROME HOBAN; PAUL VANCE; WILLIAM BEUTELL; JAMES STEPHENS; ROBERT LeBLANC and MAYNARD ENOS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, CHARLES MANUEL, by his lawyers, PRATHER & FOLEY, P.C., petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App A, infra 1A-18A) is reported at 857 F.2d 1112 (1988). The opinion and judgment of the District Court (App A,

infra 19A-62A) is not reported.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit (App A, infra 1A-18A) was entered on September 28, 1988. This appeal is being docketed in this Court within 90 days from the entry of the Order below. The jurisdiction of this Court is invoked under 28 USC Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Federal Privacy Act, 5 USC Section 552(a) et seq, provides in relevant part at Section 552a(d)(1):

> "(d) Access to Records. Each agency that maintains a system of records shall -
>
> (1) Upon request by an individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a

copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence."

II. The Federal Privacy Act at 5 USC Section 552a(a)(5) provides in relevant part:

"The term 'system of records' means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual."

III. The Federal Privacy Act 5 USC 552a(a)(4) provides in relevant part:

"The term 'record' means any item, collection or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular

assigned to the individual, such as finger or voice print or a photograph."

IV. The Federal Privacy Act further provides at 5 USC 552a(e)(4) that:

"Each Federal agency which maintains a system of records shall publish in the Federal register, a notice of the existence and character of each and every system of records it employs."

V. The Code of Federal Regulations provides at MP-1, Part 2, Chapter 21, Appendix B, 32 VAOO, Veteran Employee and Citizen Health Care Facility Investigation Records as follows:

"System location: records are maintained at each of the VA health care facilities. Address locations are listed in VA Appendix 1 at the end of the document.

Categories of individuals covered by the system: . . . 11. 'Employees who have been accused of improper and unethical conduct.

follow up concerning employees, patients and private citizens, injuries, property damage, accidents, thefts, assaults, discrimination, complaints, elopements, unethical conduct, etc."

See Appendix B for the complete text of the applicable regulations and statutes.

STATEMENT

Like the F.O.I.A., the Privacy Act of 1974 (P.L. 93-579, 88 stat. 1897) is codified as part of the Administrative Procedure Act (5 USC Section 552a); the Act is designed "to give citizens more control over what information is collected about them and how that information is used." As stated in House Report #95-793,[1] the Privacy Act accomplishes this in five basic ways:

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[1]"A citizens guide on how to use the FOLA and the Privacy Act in requesting government documents, Thirteenth Report by the Committee on Government Operations, 95th Congress, 1st Session, House Report No. 95-793, Washington 1977, 1b."

"It requires agencies to publicly report the existence of all systems of records maintained on individuals. It requires that the information contained in these record systems be accurate, complete, relevant and up to date. It provides procedures whereby individuals can inspect and correct inaccuracies in almost all Federal files about themselves. It specifies that information about an individual gathered for one purpose may not be used for another without the individual's consent. And finally, it requires agencies to keep an accurate accounting of the disclosure of records and, with certain exceptions, to make these disclosures available to the subject of the record."

With the purposes underlying the enactment of the Privacy Act firmly in

in the Manuel case, in a light most favorable to the Plaintiff in order to see how the rulings of the trial court and the Court of Appeals have effectively emasculated and subverted the purposes behind the Act.

Charles Manuel, the Petitioner, brought this law suit against the Veterans Administration for alleged violations of the Federal Privacy Act, 5 USC Section 552a, et seq. At the time of filing this lawsuit, Charles Manuel was a black federal police officer at the Allen Park Veterans Administration Medical Center ("VAMC"). In December, 1980, Manuel became aware of an open detective position, under the supervision of Jerome Hoban, at the Palo Alto, California, VAMC. Manuel applied for the position pursuant to the requirements of VA Form SF171.

On December 28, 1980, Hoban interviewed Manuel over the telephone for the detective position. Several weeks later, Hoban again telephoned the Allen park VAMC and spoke to Lt. Ronald Hypes, Manuel's immediate supervisor, regarding Manuel's performance and capabilities. Hypes informed Hoban that Manuel was an efficient and punctual police officer.

In April of 1981, Manuel was contacted by Mr. Frank A. Menus, Personnel Management Specialist, Office of the Special Counsel, Washington, D.C. Mr. Menus discussed Manuel's application for the position of detective at the Palo Alto, California VAMC and informed Manuel that he was investigating some "irregularities in filling the detective post at Palo Alto."

Mr. Dreverskracht, a personal friend

the other four announced candidates had been awarded the position of detective at the Palo Alto, California VAMC by Hoban. Mr. Dreverskracht was not one of the original five finalists considered.

Mr. Menus asked Manuel if he would be willing to testify in an administrative proceeding against Mr. Jerome Hoban for violation of 5 USC Section 2302(b)(4), (6) and (8). Manuel agreed. Hearings were held on the complaints against Jerome Hoban in San Francisco, California, between November 18 and December 2, 1983. During the course of those hearings, Messrs. Simpson, Enos, LeBlanc and Fasone, all former individual defendants, testified. William Beutell, Associate Director of the Allen Park VAMC at the time, was also subpoenaed to testify but never took the stand. Hoban was ultimately found guilty

of violating 5 USC Section 2302(b)(4) with respect to Manuel.

Prior to the hearing, Thomas Simpson, Chief of Police, Allen Park VAMC, made numerous telephone requests to James G. Fasone, Regional Security Director, VA, commencing some time shortly before August of 1983, requesting that a special investigation be conducted at Allen Park VAMC by criminal investigators, Robert LeBlanc and Maynard Enos.

Three documents, copies of which Manuel sought to obtain under the Privacy Act, were generated by VA criminal investigators Robert LeBlanc and Maynard Enos. One Report of Contact dated October 15, 1983, signed by LeBlanc, reported that had he had seen VA Police Officer Manuel solicit and execute

three hard boiled eggs in the VAMC, Allen Park Canteen about 10:00 a.m. on that date.

A second undated Report of Contact signed by LeBlanc reported overhearing a conversation between Manuel and another VA Police Officer Ronald Hypes at the same Canteen on October 18, 1983, at about 10:30 a.m. The conversation involved the alleged tailoring of proposed testimony for the hearing to be held in November - December 1983 in San Francisco, California against Hoban.

The Uniform Offense Report, the third document, signed by LeBlanc, accused Manuel of theft of government property.

LeBlanc, who prepared all three documents, turned them over to Enos, his immediate supervisor, without retaining any copies. Together with other

documents, Enos turned over the Uniform Offense Report and the related Report of Contact (concerning Manuel's alleged underpayment for a cup of coffee and three hard boiled eggs) to then Associate Director Beutell of VAMC, Allen Park. Copies of the Uniform Offense Report and the related Report of Contact were sent to Fasone in Washington, D.C., and also initially kept by Enos in Livermore, California. The original Uniform Offense Report went from Beutell at VAMC, Allen Park to VA District Counsel MacMillan (in Detroit) and then to the United States Attorney's Office for possible criminal prosecution. The original Report of Contact (concerning the coffee and eggs), which Beutell kept temporarily in his desk at VAMC, Allen Park, after receipt from Enos, was destroyed by Beutell

Veterans Administration, District Counsel, John MacMillan, testified that Beutell's destruction of the Report of Contact was unauthorized and was not the appropriate course of action to take.

The third document at issue, the Report of Contact involving proposed testimony at the Hoban hearing, was not given by Enos to Beutell as the other two documents (no criminal or disciplinary action apparently being contemplated) were. Instead copies were sent to (1) Fasone in Washington; (2) the Office of Special Counsel (conducting the Hoban hearing); (3) VA District Counsel, San Francisco (monitoring the Hoban hearing); (4) Hoban; and (5) a copy was retained by Enos in Livermore, California.

Thus, the facts when viewed in the light most favorable to Mr. Manuel lead to the inescapable conclusion that in an

effort to discredit Manuel's testimony in the administrative hearing in Palo Alto, California in the case of Special Counsel versus Jerome Hoban, Messrs. Simpson, Enos, LeBlanc, Fasone and Hoban used the allegations of theft of government property and subordination of perjury against Charles Manuel contained in the Reports of Contact and Uniform Offense Reports.

The administrative law judge in the case of Special Counsel v Jerome Hoban made the following findings with respect to the credibility of Special Investigators, Enos and LeBlanc:

> "Aside from inconsistency in the testimony of Enos and LeBlanc, another telling aspect was their aptitude for making fortunate discoveries accidentally, such as happening upon and overhearing conversations of Manuel and Hypes in the Allen Park VAMC cafeteria, allegedly conspiring

was bizarre, smacked of serendipity, and simply was not reliable."

In spite of the inherent unreliability of the Reports of Contact and Uniform Offense Reports filed by LeBlanc and Enos against Manuel, Director Stephens, Assistant Director Beutell, Chief of Security Simpson, and Regional Security Director Fasone, allowed the two Reports of Contact and the Uniform Offense Report to be used to impeach Manuel's testimony in the matter of Special Counsel v Hoban. Thereafter, Simpson and/or Beutell failed to file the records in the pertinent systems of records as required by 32 VAOO or, alternatively, to bring the allegations against Manuel to his attention by any other means so as to afford Manuel a full and fair opportunity to rebut the accusations made against him.

Manuel made four separate requests for the Uniform Offense Reports and Reports of Contact contained within his employment file and on each occasion was informed that there were no such documents contained within his file. In response to the denials of his requests for records Manuel commenced litigation in the Wayne County Circuit Court against the Veterans Administration under the Privacy Act.

On March 11, 1987, following oral argument by counsel pursuant to Defendant's Motion for Summary Disposition, the Honorable Julian Cook granted the Defendant's Motion for Summary Disposition and his ruling from the bench stated in part:

> "The difficulty that the court had revolves around a situation such as that which has been described by Plaintiff wherein

> negligence, fails or refuses or neglects to or purposefully prevents a document from getting into the system for his own purposes.
>
> The court does not believe that the Privacy Act covers such a situation. Thus, the court believes that the Defendant's Motion for Summary Disposition should be granted."

Charles Manuel appealed the District Court's decision granting Summary Judgment in favor of the Veterans Administration to the Sixth Circuit Court of Appeals. He contended that the decision of the District Court was predicated on an overly technical reading of 5 USC 552a(d)(1). Specifically, Mr. Manuel appealed the District Court's ruling on two points: (1) the denial of access to three investigative reports or documents, and (2) the failure of the custodian of records to place those documents within the Veterans Administration's system of records.

The Court of Appeals affirmed the District Court on the first issue stating that: "It is clear considering relevant case law, the Privacy Act does not apply where documents at issue are not contained in the agency's 'system of records'. See Smiertka v United States Department of Treasury, 447 F Supp 221, 228-229 (D.D.C. 1978), vacated and remanded on other grounds, 604 F2d 698 (D.C.C. 1979).

Regarding the second issue, the Court of Appeals affirmed the trial court reasoning that the VA had no affirmative duty to place the records within the system of records; that the agency was not required to place information in its records at the request of an individual; and that under the Privacy Act the VA was only required to "maintain in its

individual as is relevant and necessary to accomplish a purpose of the agency " and because the records requested were not relevant or necessary to accomplish a purpose of the agency there was no duty to insert them in the system of records.

It is respectfully submitted that both the trial court and the Court of Appeals decisions should be set aside because: (a) they undermine and subvert the purposes behind the Privacy Act; (b) they misconstrue applicable case law; and (c) they fail to take into account the Federal regulation which imposes an affirmative obligation on the VA to insert the requested records into the system of records.

In 1974, Congress enacted the Federal Privacy Act and the remedial purpose which Congress intended the Act to have is most evident in the preamble

to the Act itself, which states:

> "A purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal agencies, except as otherwise provided by law, to - . . . collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information." Pub L. #93-579, Section 2(b)(4) 88 Stat. 1896 (1974), codified at 5 USC 552a.

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the personal privacy protections afforded to United States government employees by the Privacy Act. Should the District Court and Court of Appeals decisions be upheld, the congressional intentions behind enactment of the Privacy Act will be completely

failing to insert a document into a relevant system of records the governmental agency could side step the requirements of the Act that information contained in a "system of records" be accurate, complete, relevant and up to date; the procedures whereby individuals can inspect and correct inaccuracies in Federal records would be superfluous because there would not be any documents in the system of records; the requirement that information gathered about an individual for one purpose not be used for another purpose without the individual's consent would be meaningless; and finally, the requirement that agencies keep an accurate accounting of the disclosure of records would simply cease to exist as has occurred in the Manuel case.

This entire case hinges on the interpretation of the phrase "contained in the system of records". The Court of Appeals granted the Defendant's Motion for Summary Disposition stating that: "The custodian of this system at VAMC, Allen Park, is Thomas Simpson, Chief of Security Service. Mr. Simpson by affidavit swore that none of the three documents is or ever has been in his files". Quite simply this is not enough to support the Defendant's Motion for Summary Disposition on the basis that "the records were not contained in the system of records".

In order to determine whether the documents requested were contained within the system of records, we must look to the definitional sections of the Privacy Act; the term "system of records" is defined at 552a(a)(5) as follows:

> "The term 'system of records' means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual."

There is no dispute in this case that the documents requested referenced Mr. Manuel by name. In point of fact, these documents were generated for the sole purpose of impeaching Mr. Manuel's testimony in the case of Special Counsel v Jerome Hoban. The fact that Mr. Simpson either neglected to or failed to insert the records in his file cabinet does not mean they are not contained within a system of records. One can review the definitional sections of the Privacy Act line for line and nowhere does it say that the VA official charged with maintaining the system of records has to have the particular document

requested in his file cabinets. To the contrary, all the Act requires is that the information be retrieved by the name of the individual or by some identifying number. It is somewhat odd that the VA was able to retrieve these documents in order to impeach Mr. Manuel's testimony at the Hoban trial and yet when he requested them, they could not be located. It is respectfully submitted that this situation presents one of the dangers that the Privacy Act was specifically designed to address.

It is a well known principal of statutory construction that a remedial statute should be liberally construed in favor of the individuals it was designed to protect. Sachs v Ohio National Life Insurance Co., 131 F2d 134 (C.A. 7, 1942); Sablowski v U.S., 101 F2d 183 (C.A. 3, 1938); Grier v Kennan, 64 F2d

605 (C.A. 8, 1933)

The case of Zeller v U.S., 467 F Supp 487, 498 (1979) indicates that the Privacy Act is a remedial act; it was designed to protect government employees from intrusions on their privacy and destruction of their reputation and good names.

Logic dictates that it is insufficient for a Veterans Administration employee (or any Federal employee for that matter) in response to a request of records pursuant to 5 USC 552a(d)(1) to merely declare in an affidavit or otherwise, that he has checked his records and has determined that the requested records do not exist. To sustain such a response sabotages the purpose of this statute and flagrantly encourages the creation and use of secret records detrimental to the

government employee while never allowing that individual to see, confront or rebut that record because technically it is never placed into a system of records, despite the fact it is referenced by the individual's name. This practice has no place in free society or in the government of the United States!

In any event, the cases cited by the Court of Appeals simply have no application to the instant factual situation. For example, the Court of Appeals cited Smiertka v United States Department of Treasury, 447 F Supp 221 (D.D.C. 1978), vacated and remanded on other grounds, 604 F2d 698 (D.C.Circ. 1979) for the proposition that the items did not qualify as records in a system of records because they were not accessible by the Plaintiff's name or other personal identifier, but by the name of the agency

investigator who prepared them. In the Smiertka case, Plaintiff had requested access to a series of daily reports prepared by an agency investigator. The daily reports contained references to investigations conducted regarding the Plaintiff. The records were not accessible by the Plaintiff's name or other personal identifier, but rather by the name of the agency investigator who prepared them.

This is completely distinguishable from the facts in the Manuel case. The Uniform Offense Reports and the Reports of Contact were accessible by the Plaintiff's name. They were not documents prepared by the investigators as retained summaries of their work. Rather, they were specifically directed to Mr. Manuel. Hence, Smiertka is inapplicable.

In Manuel's case, there was not one iota of testimony or documentary evidence submitted that would support the proposition that these records were not accessible by the Plaintiff's name or other personal identifier. In point of fact, the reasonable inference is that these records were specifically prepared for the purpose of undermining and impeaching Mr. Manuel's testimony against Mr. Jerome Hoban. When it came time for Mr. Manuel to testify, the agency had no problem locating the records; it was only when Mr. Manuel requested them that the VA asserted that they were not contained within the system of records.

Regarding both the trial court and the Court of Appeals' ruling that there was no affirmative duty to place the requested records within a system of records, it is respectfully submitted

that both the trial court and the Court of Appeals failed to address the Federal regulations, specifically 32 VAOO which require that: "Copies of reports of investigations, . . . thefts, . . . and unethical conduct," be inserted in the system. Instead, the courts cite a number of cases which are simply inapplicable. For example, the Court of Appeals cited Savarese v United States Department of Health, Education and Welfare, 479 F Supp 304 (N.D. Ga. 1979), aff'd mem. sub. nom. Savarese v Harris, 620 F2d 298 (5th Cir. 1980), cert. denied, 449 US 1078, 101 S.Ct. 858, 66 L.Ed2d 801 (1981) for the proposition that an agency is not required to place information into its records simply because an individual requests such action and Wren v Heckler, 744 F2d 86 (10th Cir. 1984), for the proposition

that an agency is not required to place information in its records at the request of an individual. These cases are distinguishable and are simply not relevant to Mr. Manuel's situation. He never requested that the documents be inserted into a system of records; rather, the Federal regulations, 32VAOO specifically require that the documents be inserted into the system of records. Thus, the court's reliance upon these cases in inexplicable.

Agency regulations promulgated pursuant to specific Congressional authority are presumptively valid and entitled to great deference. Local 2047 v Defense General Supply Center, 423 F. Supp 481, 485 (Ed Va 1976). See also Griggs v Duke Power Co. 401 US 424, 433-34, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); Udaul v Tall Man, 380 U.S. 1, 16, 85

S.Ct. 792, 13 L.Ed.2d 616 (1968). In this case the applicable regulations 32 VAOO requires that Uniform Offense Reports should be put into the system of records. This regulation is entitled to deference and it is not sufficient that the Defendants have submitted an affidavit by the keeper of records indicating that the requested records were not contained within his file cabinet.

As the Court of Appeals neglected to mention, the Savarese court specifically stated: "Factual issues concerning reasonableness are not easily disposed of on summary judgment, and where, as here, the facts are clearly in dispute, summary judgment is particularly inappropriate." Id. page 307

Similarly, in this case, whether or not the agency acted reasonably is

disputed and it was inappropriate for the trial court to grant summary disposition and for the Court of Appeals to affirm the trial court's grant of summary disposition.

Further, in the Savarese case, the Defendant contended that the information was contained only in the general correspondence and program files and was not keyed for retrieval by means of names or name related identifiers; hence, there was no system of records. The Plaintiff agreed with this contention Id. page 307. Thus, the Savarese decision is completely distinguishable.

The Court of Appeals went on to quote Savarese, supra, for the proposition that the agency is required to:

> ". . . maintain all records which are used by the agency in making any determination about any individual with such

> accuracy, relevance, timeliness and completeness as is reasonably necessary to assure fairness to the individual and the determination . . ."

Based on this quotation, the Court of Appeals concluded that all the Privacy Act requires is that the agency has done what is reasonable in insuring the accuracy of the information included, no more is required. (Court of Appeals decision, page 14) This is ludicrous! In point of fact, the presumption underlying the Privacy Act is that the agency will not do what is reasonable to insure the accuracy of the information and therefore it is necessary that the employee have access to these records so that he can insure the accuracy of the information. Nowhere in the transcript below does it indicate that the agency had done what is reasonable in insuring the accuracy of the information. In

point of fact, the administrative law judge in the administrative hearing in Special Counsel v Jerome Hoban made the following findings with respect to the credibility of special investigators Enos and LeBlanc:

> "The testimony of Enos and LeBlanc was bizarre, smacked of serendipity, and simply was not reliable."

The record below is quite simply devoid of any factual basis for the Court of Appeals' holding that the agency had done all that was reasonable in insuring the accuracy of the information.

Further, the Court of Appeals seemed to rely on the fact that there was never an official adverse determination or remedial action taken against Manuel based upon the documents at issue. In point of fact, the damage done to Mr. Manuel's reputation and his chances of promotion cannot be accurately accessed!

This is one of the primary motivating factors behind the enactment of the Privacy Act. It is simply impossible to calculate the damage done to reputation and the impairment of chances for advancement within an agency because of documents containing unfounded accusations against an employee. For this reason, Congress thought it appropriate to give employees an opportunity to respond to statements contained within employee records. There is no requirement that an employee must be able to demonstrate that the agency used the documents in making an adverse determination against the employee.

CONCLUSION

For all the reasons enumerated above, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

JAMES R. STEARNS
Attorney for Petitioner
3800 Penobscot Building
Detroit, MI 48226
(313) 962-7722

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